

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :
:
v. : 98-CR-1129 (RJD)
:
ROY AGELOFF, : March 23, 2010
:
Defendant. : Brooklyn, New York
:
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TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE RAYMOND J. DEARIE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 THE CLERK: We are on this afternoon for a status
2 conference. This is U.S.A. versus Roy Ageloff, docket
3 number CR-98-1129. Mr. Ageloff is defendant number eight.

4 Can I ask the attorneys please to note their
5 appearance, beginning with counsel for the government.

6 MR. SPECTOR: Good afternoon, Your Honor. Daniel
7 Spector for the government.

8 MR. FENSTERMAKER: Good afternoon, Your Honor.
9 Scott Fenstermaker for Mr. Ageloff.

10 THE COURT: Gents, good afternoon.

11 Well, since I saw you last, I received the --
12 well, first things first.

13 I have Mr. Fenstermaker's letter of March 21,
14 referring to a pro se filing of Mr. Ageloff's, which I take
15 is this (indicating).

16 MR. FENSTERMAKER: Yes, Your Honor, that is.

17 THE COURT: This is a handwritten, lengthy,
18 handwritten submission, dated March 17th, 2010, which
19 according to -- according to Mr. Fenstermaker's letter is
20 now being withdrawn.

21 Is that right?

22 MR. FENSTERMAKER: That's my request, Your Honor,
23 although it's my understanding Mr. Ageloff objects to my
24 attempt to withdraw his pro se submission.

25 THE COURT: Is that right? Okay.

1 Sir?

2 THE DEFENDANT: That's correct.

3 THE COURT: How come?

4 THE DEFENDANT: I -- I feel that the submission
5 that I --

6 THE CLERK: Excuse me for one second. Can I just
7 move this microphone? Okay. Okay, Mr. Ageloff.

8 THE DEFENDANT: Okay.

9 I feel that the submission that I filed, in terms
10 of the affidavit in support of motion to dismiss, is --

11 THE COURT: Motion to dismiss what?

12 THE DEFENDANT: Well, there's a motion to dismiss,
13 as far as I understand, that was going to be filed prior to
14 today's hearing. Unfortunately, that didn't take place.
15 It's actually my understanding that it is in the midst of
16 taking place.

17 But in any event, my submission was to provide the
18 Court with some information that I feel is extremely
19 important to my case. And therefore, I would like for it to
20 remain on the record.

21 THE COURT: All right, we'll talk about it. Let's
22 get back to the subject matter at hand.

23 I have correspondence from counsel, like ships
24 passing in the night, it seems to me. This case has been
25 around for years. Voluminous information has changed hands,

1 both in the context of the criminal case as well as this
2 related issue of restitution. It appears to me that we're
3 going to have to have a hearing, and I'm happy to conduct
4 such a hearing.

5 I must say, I don't recall a single word of
6 testimony during the Eljindy (ph) trial, for example, about
7 transfers of house stocks from one account to -- from one
8 account to another. Maybe I'm wrong. I don't recall a
9 single word of evidence that these house stocks at any time
10 had any value, much less that they -- there were cash
11 payouts on these accounts. Not a word of it. And given
12 what ultimately occurred, I'd be surprised if -- if there
13 were any available evidence of that. But I have a -- I'm
14 willing to hear what you've got.

15 The government has the chap who prepared years ago
16 this report.

17 MR. SPECTOR: That's correct, Your Honor. I've
18 been in contact with him. In terms of scheduling, he's tied
19 up on another trial for most of April, but after that, will
20 be available to testify.

21 THE COURT: This case will never end. And we'll
22 have to bring him in and conduct a hearing. The other --

23 MR. FENSTERMAKER: Your Honor --

24 THE COURT: -- irony to all of this is that Mr.
25 Ageloff perhaps is in a better position than anyone on all

1 of this, and yet I have a lengthy letter from counsel
2 seeking additional discovery, which of course, I guess to
3 some extent, acknowledges is no longer available.

4 MR. SPECTOR: Well, as a -- as a preliminary
5 matter, it's our view that that's unnecessary and
6 inappropriate and would largely, if not entirely, be
7 duplicative of the information we've already provided, which
8 is the raw data from the blue sheets, which shows all the
9 trades, all the purchases and all of the sales to all the
10 victims.

11 THE COURT: Per victim.

12 MR. SPECTOR: Per victim, correct. And we've
13 provided both that raw data as well as the restitution
14 report, which breaks down the total loss per victim as well
15 as the address of each victim. We provided that in December
16 to defense counsel. I believe it was provided years ago to
17 the defendant as well as to the Court. And in our view,
18 that's more than sufficient to meet our burden in this
19 context.

20 THE COURT: Sir?

21 MR. FENSTERMAKER: Your Honor, Mr. Ageloff briefly
22 alluded to a motion to dismiss. And the reason that he
23 alluded to that is that I will -- I'm in the process of
24 drafting such a document. I don't know if the proper title
25 of it would be a motion to dismiss. But basically, the

1 effect of it would be to request that the Court preclude the
2 government from offering proof at this stage with respect to
3 the restitution issue because of what I'll call speedy
4 sentencing issues.

5 On speedy sentencing, I would -- I would drop into
6 various issues of due process, speedy trial, 3664(d)(5), as
7 well as Federal Rule of Criminal Procedure 32.

8 In addition to that --

9 THE COURT: Outrageous.

10 MR. FENSTERMAKER: -- those various -- those
11 various motions are --

12 THE COURT: Absolutely outrageous, but go ahead.

13 MR. FENSTERMAKER: Yes, Your Honor.

14 THE COURT: That's not directed at you, Mr.
15 Fenstermaker.

16 MR. FENSTERMAKER: Yes, Your Honor.

17 But in addition, Your Honor, I would like to, as
18 part of that motion, make what I would call a criminal
19 version of a motion for summary judgment. And what I would
20 like to do, Your Honor, is point out that based upon the
21 information that the government has available to it, that it
22 cannot, as a matter of law, prove its restitution claims.

23 And the reason for that, Your Honor, is that the
24 -- the raw data that they claim to have, as well as the
25 restitution report that I understand was created from that

1 raw data, could not -- does not prove their claims of
2 restitution, simply because it's incomplete. It's
3 incomplete in any number of ways, Your Honor.

4 I do not know specifically what the issues were in
5 the trials that you alluded to, but I do not believe that
6 one of the elements of proof in any of those was a
7 restitutionary claim. I think that they were basically
8 criminal trials which were directed at determining whether
9 or not people committed crimes.

10 And in this case, Your Honor, based upon what I
11 now believe, after reviewing the evidence, reviewing the
12 data that I've seen, is incomplete reports that are based
13 upon hearsay; that were created as a summary by a private
14 organization for the purpose of feeding information to -- to
15 law enforcement, I don't think that they can prove their
16 claims, and I'd like to be able to submit that.

17 And the reason that I would like to submit that
18 Your Honor, before the hearing, is that I think, at least
19 with respect to that last issue, which I inartfully referred
20 to as a criminal summary judgment motion, I think that that
21 would frame the issues for the hearing. Even if the Court
22 denies the motion, it would certainly frame the -- the
23 issues for the hearing, because that's what the cross-
24 examination is going to be about.

25 You mentioned that the house stocks didn't have

1 any value. I've seen many charts that were compiled by
2 experts that Mr. Ageloff's prior counsel had retained, which
3 show that the house stocks did in fact have value. Now, I'm
4 not saying that this wasn't a fraudulent scheme and I'm not
5 saying that people didn't lose money. But to say that they
6 were all equal to zero contradicts the evidence that I've
7 seen.

8 Now, that evidence may not have been presented to
9 the Court at any point in time, because the evidence that
10 I've seen is all in the form of graphs, basically, that were
11 attached to expert reports that Mr. Ageloff's prior
12 attorneys had created.

13 And I would like the opportunity to get those
14 together. I've actually contacted an expert on my own, Your
15 Honor, who might be able to go through this and help me,
16 from a forensic accounting standpoint, to go through it. My
17 only problem getting that in the works is that I have to
18 give him access to Mr. Ageloff in the MDC.

19 I've written to the legal staff at the MDC for the
20 purpose of getting the expert to go to see Mr. Ageloff, so
21 that they can give me an idea as to how much this might
22 cost, so that I can present a -- I think it's a CJA form 21
23 to the Court for its pre-approval, because this is going to
24 be a -- a monumental undertaking.

25 I understand that this is frustrating for the

1 Court. This is a case that's been going on for -- for I'm
2 sure too long. But the problem is, Your Honor, that I'm not
3 sure that that is Mr. Ageloff's fault.

4 THE COURT: All this for a man who agreed at
5 sentencing that the losses sustained were in excess of
6 eighty million dollars.

7 MR. FENSTERMAKER: Well, that -- Your Honor,
8 that's a different issue than restitution. And I could
9 briefly describe why I feel that that's a different issue
10 and why we still need to focus on this, Your Honor.

11 First of all, with respect --

12 THE COURT: The eighty million was in the context
13 of restitution.

14 MR. SPECTOR: That's correct, Your Honor.

15 MR. FENSTERMAKER: Your Honor -- Your Honor, with
16 respect to that issue, I don't think that that was part of
17 the plea agreement.

18 THE COURT: If I recall correctly -- well --

19 MR. FENSTERMAKER: I don't think that that was
20 part of the plea agreement. I mean, if it was part of the
21 plea agreement, then --

22 THE COURT: It was in the plea agreement. If I
23 recall correctly, the opinion from the Circuit acknowledged
24 that Mr. Ageloff admitted to restitution in the amount of at
25 least -- don't hold me to these precise words -- of eighty

1 million dollars. The problem was that we didn't identify
2 the victims, among other things.

3 So my comment was, all of this litigation now in
4 support of a man who's already been found guilty of -- of
5 squirreling away assets to defeat a restitution claim.
6 Interesting, interesting. So if you sense some frustration,
7 you're right.

8 MR. FENSTERMAKER: Your Honor, one thing I'd like
9 to say is, Mr. Ageloff was never convicted of squirreling
10 away assets --

11 THE COURT: What was the crime?

12 MR. FENSTERMAKER: The crime, Your Honor, was not
13 reporting income that was produced from the ill-gotten
14 gains.

15 THE COURT: I rest my case.

16 Go ahead.

17 MR. SPECTOR: Judge, the idea of having an
18 extensive proceeding to the litigate the issue of whether
19 the house stocks have value is -- is just totally
20 inappropriate at this stage of the proceedings.

21 THE COURT: Somebody buys stock at X dollars and
22 sells it as X minus Y. If he or she is the victim of fraud,
23 what they're due is at least the difference between those
24 two numbers.

25 MR. FENSTERMAKER: Your Honor, I'm not disputing

1 that, but -- but I'd like to briefly address that specific
2 issue because that's something that I would like to present
3 to the Court in my motion that I'm suggesting.

4 Mr. Ageloff, for restitution purposes, is only
5 liable for the loss that he caused. There can be no dispute
6 in this case that some of that difference of your X and Y
7 example is attributable to the short selling that took place
8 in this case, which by any -- anybody's definition and by
9 everybody's agreement, I think, was illegal. And Mr.
10 Ageloff had nothing to do with the short selling in this
11 case, Your Honor.

12 And much, if not most of the loss in this case was
13 caused not by Mr. Ageloff's scheme but by the short sell.
14 And that's something that I would like to -- to aggressively
15 address in this motion, Your Honor, because it's clear that
16 the cases I've read on restitution say that Mr. Ageloff will
17 only be held liable for what he caused. And certainly what
18 he caused was not caused as a result of that short selling,
19 which we was a victim of.

20 And I understand that you could say, well,
21 criminals can't be victims, but without question, what
22 caused this whole scheme to unravel was the short selling,
23 which was illegal by anybody's definition. And I think that
24 the -- the FBI investigated that -- my understanding is
25 there were two FBI agents involved in the investigation of

1 the illegal short selling. The SEC and the NASD were both
2 notified with respect to the illegal short selling. And it
3 was that -- that illegal contact, Your Honor -- conduct,
4 Your Honor, that created most of the losses here.

5 I'm not saying that Mr. Ageloff wasn't wrong and
6 that he wasn't -- wasn't justly convicted of the crime, Your
7 Honor. But what I'm saying is that the restitution should
8 be correctly calculated. It shouldn't be just guessed upon
9 because we don't like Mr. Ageloff and the fact that he -- he
10 stole some money.

11 THE COURT: I'm sure his -- his counsel in the
12 criminal case didn't guess when he came to the number, as I
13 recall, in the plea agreement. I think it's in the plea
14 agreement.

15 MR. SPECTOR: I believe that's correct, Your
16 Honor. I don't know whether it was in the plea agreement or
17 another document but --

18 THE COURT: Okay. Look --

19 MR. SPECTOR: It's certainly clear that he agreed
20 to the amount of eighty million dollars in restitution.

21 THE COURT: Let's set a date for the hearing. If
22 you want to file some motions, file it in a week.

23 Does May 17th work for everybody?

24 MR. FENSTERMAKER: Your Honor --

25 MR. SPECTOR: That's fine with the government,

1 Judge.

2 MR. FENSTERMAKER: Your Honor, can I have -- can I
3 have a slightly longer period of time than a week. I have
4 an arbitration that I have on Monday, the 29th.

5 THE COURT: Two weeks.

6 MR. FENSTERMAKER: Yes, Your Honor.

7 THE COURT: Thank you and good day.

8 THE DEFENDANT: Your Honor, may I --

9 MR. SPECTOR: Judge, I assume the government --

10 THE DEFENDANT: May I address the Court, Your
11 Honor.

12 THE COURT: No.

13 Yes, sir?

14 MR. SPECTOR: I assume the government can wait to
15 respond until after the hearing.

16 THE COURT: Yeah.

17 MR. SPECTOR: Thank you, Judge.

18 THE COURT: Next case.

19 THE CLERK: Okay, so, Mr. Fenstermaker, you have
20 until April 6th.

21 MR. FENSTERMAKER: Thank you.

22 MR. SPECTOR: I'm sorry, did we have a date of the
23 hearing?

24 THE CLERK: May 17th.

25 MR. SPECTOR: Oh, May 17th, okay.

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THE CLERK: May 17th at 9:30.

MR. SPECTOR: Thank you, Judge.

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I certify that the foregoing is a correct transcript
from the electronic sound recording of the proceedings in
the above-entitled matter.

A handwritten signature in dark ink, appearing to read 'E Barron', with a long horizontal stroke extending to the right.

ELIZABETH BARRON

April 5, 2010